

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's Broadcast and)	MM Docket No. 98-204
Cable Equal Employment Opportunity)	
Rules and Policies)	

To: The Full Commission

**JOINT OPPOSITION TO "PETITION FOR CLARIFICATION, OR, IN THE
ALTERNATIVE, FOR PARTIAL RECONSIDERATION"**

The State Broadcasters Associations identified in the footnote below (collectively, the "State Broadcasters Associations" or "State Associations"),¹ by and through their attorneys, and pursuant to Section 1.429 of the Commission's Rules, hereby jointly oppose the "Petition for Clarification, Or, In The Alternative, For Partial Reconsideration" ("MMTC Petition"), filed by Minority Media and Telecommunications Council ("MMTC"), of the Commission's *Second Report and Order and Third Notice of Proposed Rule Making*, released in the above-captioned

¹ Alabama Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters.

proceeding on November 20, 2002, FCC 02-303 (“*Second R&O*”). The continued participation of the State Associations on reconsideration and clarification remains without prejudice to any position any of them may take in connection with the *Second R&O* and the regulations adopted thereunder.

INTRODUCTION

The MMTC Petition challenges the following aspects of the *Second R&O*. In the first section of its Petition, MMTC essentially asks the Commission to: (i) consider on the merits Exhibit 1 (“The Reality of Intentional Job Discrimination in Metropolitan America – 1999” by Alfred W. Blumrosen and Ruth G. Blumrosen (the “Blumrosen Study”)) to MMTC’s Ex Parte letter dated October 1, 2002; (ii) rely upon the Blumrosen Study’s findings to support adoption of new EEO rules; (iii) reverse the Commission’s conclusion that “we are not convinced that deviations below the average employment rate can be equated with intentional discrimination;” and (iv) consider adequate statistical evidence as probative of industry-wide EEO noncompliance. In the second section of its pleading, MMTC requests the Commission to delete the “small market” qualifier under Prong 3 of its new outreach requirement. As demonstrated below, MMTC has not offered a persuasive case for the grant of any of its requests.

DISCUSSION

A. The *Second R&O* Correctly Declined to Evaluate the Blumrosen Study and Properly Concluded That Deviations Below Average Employment Rates Do Not Constitute Intentional Discrimination

In the *Second R&O*, the Commission concluded that the Blumrosen Study came too late in the proceeding for the Commission to evaluate it or for interested parties to comment on it. *Second R&O* at n.110. MMTC does not contest this conclusion. The Commission also concluded that it did not need to “rely on [the study’s] findings to support adoption of the new

EEO rules.” *Id.* MMTC does not contest this conclusion either. In short, MMTC does not claim that the findings of the Blumrosen Study, even if valid, are necessary predicates for the new EEO regulations.

In any event, consideration of the Blumrosen Study’s findings would unnecessarily and inappropriately recast this proceeding, and the new regulations promulgated thereunder, from one that is prophylactic or preventative to one that is remedial based on unsupported allegations of past and ongoing industry-wide intentional discrimination. If allowed, this eleventh hour effort would change the entire character of the new EEO regulations and undermine the Commission’s repeated assurances that the staffing profiles at stations will not be used to determine compliance with the EEO regulations in any respect. The fact that MMTC has made this request suggests that MMTC sees the data in FCC Form 395-B to be linked to the EEO regulations and will seek to have the FCC use such data for the very purposes which the Commission has disavowed. Use of such data will not only place impermissible pressure on stations to hire based on race and gender; it will also undermine fundamental assurances given by the Commission in this proceeding. Accordingly, the State Associations continue to urge the Commission not to require that such reports be filed either at all or on a station attributed, publicly available basis.

It also should be noted that the Blumrosen Study, at least as it relates to the broadcast industry, is fatally defective. Specifically, the Study does not acknowledge or take into consideration that the broadcast industry has operated under a blanket of FCC EEO regulations for some three decades and that the industry’s hiring of minorities and women reflects not only a positive trend but also levels in excess of other industries. As the statistics included in the Comments filed with the FCC earlier in this proceeding demonstrate, the employment of

minorities and women in the broadcast industry has grown dramatically over the years. Specifically, from 1971 to 1997, the percentage of minorities in full-time professional broadcast positions (Officials and Managers, Professionals, Technicians and Sales Workers) increased from 8.0% to 18.2%, while the percentage of women broadcast professionals increased from 10.2% to 34.9% during the same period. *See* Joint Comments of Virginia Association of Broadcasters and North Carolina Association of Broadcasters, (MM Docket Nos. 98-204, 96-16), filed March 1, 1999. In addition, as the National Association of Broadcasters pointed out in a December 1, 1999 letter to the Commission, “the number of women in TV general manager positions [rose] nearly 39% in the last year” without any FCC-mandated EEO affirmative action rules. At any rate, the Commission has already rejected the flawed methodology of the Blumrosen Study, stating that “[the Commission] is not convinced that deviations below the average employment rate can be equated with intentional discrimination.” *Id.* Accordingly, even if the Blumrosen Study were reviewed on the merits, the study does not support MMTC’s request that the Commission use statistics to determine whether the nondiscrimination prong, or any other aspect, of its new EEO regulations is being violated.

As shown herein, consideration now of the Blumrosen Study on the merits is not only unjustified, it is inappropriate. If considered, principles of fundamental fairness would require the Commission to commence a new rule making proceeding so that interested parties could provide full critiques of the Blumrosen Study and present their own rebuttal methodologies and findings. There is simply no excuse for MMTC’s current attempt to submit the voluminous Blumrosen Study long after the notice and comment period has closed. The Administrative Procedure Act contemplates that all interested parties have the opportunity to review and respond to information in the record during the established pleading cycle. *See* 5 U.S.C. §553 (2000).

MMTC's belated attempt to inject the Blumrosen Study into the record at this late date circumvents this process. MMTC had numerous opportunities to present the Study since its release in 1999 – yet failed to do so. Reconsideration is plainly not the time or the place for adjudication of what are essentially character allegations against the entire broadcast industry.

In a continuing, desperate effort to “prove” that the broadcast industry is a racial discriminator, MMTC repeatedly asserts that the broadcast industry's use of the designation “EOE” is inconsistent. *See* MMTC Partial Opposition to Joint Petition for Reconsideration at n.3; MMTC Petition at n.10; MMTC Reply Comments at 28-31. From this, MMTC argues that all of the broadcast stations which do not use the “EOE” designation are racial discriminators. *Id.* MMTC's argument is contradictory since MMTC reaches the same conclusion even with respect to broadcasters who routinely use the “EOE” designation. MMTC Petition n.10. MMTC simply cannot have it both ways. In any event, its “EOE” designation argument is only that, an argument, and there is absolutely no evidence that broadcasters “went to the trouble to delete” the EOE designation as alleged by MMTC. MMTC Petition at n.3.

In adopting its new EEO regulations, the Commission has sought assiduously to avoid any language or action that would suggest that it is more interested in “who” is hired, than whether everyone has been given a full opportunity to compete for jobs and to be considered on his or her merits. As the Commission itself has stated, its new EEO rules “focus on the process of recruitment, not the results thereof.” *Second R&O* at ¶ 134. At bottom, without any warning to the Commission, MMTC would have the Commission return to a regulatory philosophy which the D.C. Circuit in *State Broadcasters* and *Lutheran Church* required the Commission to eschew. *See DC/MD/DE Broadcasters v. FCC*, 236 F.3d 13, *reh'g & reh'g in banc denied*, 253 F.3d 732

(D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

B. The *Second R&O* Correctly Concluded That There Should Be A Limited “Small Market” Qualifier Under Prong 3 Of The New EEO Regulations

In its Petition, MMTC asks the Commission to delete the limited “Small Market” qualifier under Prong 3 of its new EEO regulations. MMTC protests that “The *Second R&O* created a loophole under which rural Americans will be denied the same level of EEO outreach protection as urban Americans.” MMTC Petition at 4.

MMTC’s request should be denied for the following reasons. First, contrary to MMTC’s claim that Section 334 of the Communications Act deprives the Commission of the authority to adopt the small market qualifier, there is no statutory bar to the Commission adopting the qualifier since the very provision to be qualified did not even exist in 1992 when Section 334 was adopted. Second, as the State Associations have shown previously, the D.C. Circuit has twice concluded, notwithstanding Section 334 of the Act, that the two former versions of the Commission’s EEO regulations must be vacated.² Moreover, the Commission itself found no statutory bar to suspending portions of the former EEO rules that the court did not vacate. In short, the Commission is not even required to re-adopt EEO regulations. Surely if it is not required to re-adopt such regulations, it is not prevented from modifying them as it has done. Third, the qualifier does not act as a broad exemption from the three prong outreach requirement. Specifically, the qualifier does not affect the wide dissemination requirement which is triggered when a nonexempt station employment unit (“SEU”) seeks to fill a full-time vacancy. It does

² See Joint Comments of the State Associations, *Third Notice of Proposed Rule Making*, MM Docket 98-204, at 7 citing *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998); *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002).

not affect the right of referral organizations to contact such SEUs and be placed on the SEU's mailing list for information about future job openings. Even the smallest SEU is required to participate in at least two types of non-vacancy specific outreach initiatives *which will generally involve multiple individual activities or events over two-year periods.*

The appropriateness of the qualifier is obvious. The qualifier is based on the Commission's recognition that every community is not the same in terms of the types and numbers of educational, business and civic organizations present in a station's community and with which a station may work to expand an awareness of opportunities in broadcasting. MMTC's "second-class" rhetoric notwithstanding, the broadcast industry expects to continue to treat its rural listeners and viewers with the same respect, employment opportunities, and public service that are enjoyed by its urban listeners and viewers.

CONCLUSION

Based on the foregoing, the State Associations respectfully request the Commission to dismiss or deny the MMTC Petition in its entirety.

Respectfully submitted,

STATE BROADCASTERS ASSOCIATIONS

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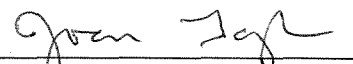
Dated: March 24, 2003

CERTIFICATE OF SERVICE

I, Joan Taylor, a secretary with the law firm Shaw Pittman LLP, hereby certify that a true and correct copy of the foregoing **Joint Opposition to "Petition for Clarification, Or, In the Alternative, for Partial Reconsideration"** was sent via U.S. mail this 24th day of March 2003, to the following:

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